IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| TENET HEALTHSYSTEM MCP, L.L.C. | : | CIVIL ACTION |
| | : | |
| v. | : | |
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| PENNSYLVANIA NURSES ASS'N LOCAL 712 | : | NO. 01-2201 |

**MEMORANDUM**

**Padova, J.** **December , 2001**

Plaintiff Tenet Healthsystem MCP, L.L.C. ("Tenet") brings this action to vacate a labor arbitration award pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1-16 (West 1999). Before the Court are the parties' cross-motions for summary judgment. For the reasons which follow, the Court denies each Motion in part, grants each in part, and remands this matter to the arbitrator.

I. BACKGROUND

This case arises out of the arbitration of a grievance filed by Nurse Raymond Fleming, a member of Pennsylvania Nurses Association Local 712 ("Local 712"), with respect to his discharge by Tenet. In September 1999, a psychiatric patient was transferred to Tenet from another facility by ambulance and voluntarily admitted to the psychiatric unit after expressing a wish to kill someone. He was escorted to a secure locked area of the facility. Fleming was assigned to supervise him. The patient would not cooperate with Fleming and demanded to be released. Fleming notified his supervisor and released the patient. Tenet claimed that Fleming failed to follow proper procedure and discharged him.

On January 25, 2001, an arbitration hearing was held regarding Fleming's discharge. The arbitration was conducted pursuant to the terms and conditions of the Collective Bargaining Agreement ("CBA") between the Local 712 and Tenet. Although the CBA had not been executed at the time the Petition was filed, the parties agree that they have been following the provisions of the CBA which are at issue in this action. The arbitrator issued his decision on February 16, 2001. (Pl. Ex. C). He decided that Fleming's actions did not warrant a discharge, found that the first ten days of his discharge served as a ten-day suspension, and ruled that he was to be reinstated without loss of seniority and made whole for all monies he lost. (Pl. Ex. C at 19.) Any monies Fleming had received after his termination were to be deducted from the monies paid by Tenet. (Pl. Ex. C. at 19.) The arbitrator's decision did not specify the amount of back pay awarded.

The parties subsequently discussed the amount of back pay due Fleming, and Tenet requested information from Local 712 with respect to Fleming's attempts to find new employment after his termination by Tenet. The parties then held two conference calls with the arbitrator concerning mitigation of damages. On April 6, 2001, during the second conference call, the arbitrator clarified his February 15, 2001 decision and explained that his award of back pay would not be reduced because of Fleming's failure to obtain other employment after his termination.

The arbitrator memorialized this decision in a letter to the parties. (Pl. Ex. D.) He explained that, to his knowledge, there is no state or federal statute requiring him to reduce the award of back pay "based upon the grievant's lack of effort to seek work of a similar nature during his termination period" although some arbitrators have done so, "possibly in some circumstances rightly so." (Pl. Ex. D at 2.) He also stated that his "responsibility and authority as the Arbitrator rests in the language of the Agreement and the evidence presented to [him] at the hearing" and that the award "must draw its essence from the [CBA]." (Pl. Ex. D. at 1 and 2.) The CBA states, in relevant part, as follows:

> All claims for back wages shall be limited to the amount agreed to by Hospital and the Association, or ordered by the Arbitrator, as the case may be, less any unemployment compensation or other compensation that the aggrieved employees may have received from any source during the period for which back pay is claimed.

(Pl. Ex. B. ¶ 25.7.) The April 6, 2001 letter also noted that, by requiring that Fleming be made whole, the arbitrator was utilizing the universally accepted remedy for calculating back pay which properly deducts any monies Fleming received while terminated, which he would not have received if he had been working, and which prevents Fleming from being rewarded with extra monies during the termination period. (Pl. Ex. D at 2.) Tenet filed its Petition to Vacate/Modify Labor Arbitration Award on May 4, 2001. Local 712

answered the Petition on June 27, 2001 and brought counterclaims for enforcement of the arbitration award and attorney's fees.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in

this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir. 1993)). The Court considers cross-motions for summary judgment separately. Williams v. Philadelphia Housing Authority, 834 F. Supp. 794, 797 (E.D. Pa. 1994) ("Each party still bears the initial burden of establishing a lack of genuine issues of material fact. Such contradictory claims do not necessarily guarantee that if one party's motion is rejected, the other party's motion must be granted.") (citations omitted).

III. DISCUSSION

A. The Petition to Vacate/Modify

Tenet seeks to have the arbitration award vacated because the Arbitrator did not reduce the award of back pay to reflect

Fleming's alleged failure to seek employment after being terminated. The Court's review of an arbitrator's award is very limited. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 121 S. Ct. 1724, 1728 (2001). "The Supreme Court has made clear that courts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed." Appalachian Regional Healthcare v. Local 14398, 245 F.3d 601, 604 (6th Cir. 2001) (citation omitted). Indeed, "the test used to probe the validity of a labor arbitrator's decision is a singularly undemanding one." National Assoc. of Letter Carriers, AFL-CIO v. United States Postal Service, 272 F.3d 182, 185 (3d Cir. 2001) (citations omitted). The FAA permits a district court to vacate an arbitration award in the following circumstances:

> (1) Where the award was procured by corruption, fraud, or undue means;
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient evidence shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> (4) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (1994). The Court may also vacate an arbitration award "that is in manifest disregard of the law; fails the test of

fundamental rationality; or, is entirely unsupported by the record." Roadway Package System, Inc. v. Kayser, No.Civ.A. 99-mc-111, 1999 WL 817724, at *5 (E.D. Pa. Oct. 13, 1999) (citations omitted).

In Count I of the Petition, Tenet claims that the Arbitrator's award should be vacated because his decision not to reduce the award of back pay based upon of Fleming's failure to seek other employment is in manifest disregard of the law. Both parties seek entry of summary judgment on Count I of the Petition.

> "Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in Wilko v. Swan, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L.Ed. 168 (1953). It is not to be found in the federal arbitration law. Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable

> difference regarding the meaning or applicability of laws urged upon it.

Carte Blanche (Singapore) v. Carte Blanche (Int.), 888 F.2d 260, 265 (2d Cir. 1989) (citations omitted). Tenet asserts that the requirement that a plaintiff mitigate damages is "beyond cavil." In support of its argument, Tenet relies on the statutory requirement that back pay awards to successful Title VII plaintiffs be reduced by the amounts those individuals earned, or could have earned. 42 U.S.C.A. §2000e-5(g)(1) (West 2001) ("Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."). Tenet also relies upon the fact that failure to mitigate damages can be raised as an affirmative defense in an action for back pay before the National Labor Relations Board. Tubari Ltd., Inc. v. NLRB, 959 F.2d 451, 453-54 (3d Cir. 1992). It also cites to decisions by individual arbitrators who have found that employees have a duty to mitigate and to Elkouri & Elkouri: How Arbitration Works which states that "[m]any arbitrators believe that an employee who has been wronged by an employer has an affirmative duty to mitigate, so far as reasonable, the amount of the loss." Marlin M. Volz & Edward P. Goggin, Elkouri & Elkouri: How Arbitration Works 593 (5th ed. 1997).

However clear an employee's duty to mitigate damages by finding new employment may be in some circumstances, it is not clear that arbitrators must always reduce awards of back pay based

upon an employee's failure to do so. Indeed, "it is settled that arbitrators have discretion to decide whether lost earnings should be offset by interim earnings or a failure to mitigate. . . ." Automobile Mechanics Local 701 v. Joe Mitchell Buick, 930 F.2d 576, 578 (7th Cir. 1991). Tenet has cited no authority for the proposition that arbitrators must always consider mitigation in awarding back pay. This issue was examined in Teamsters, Local Union 330 v Elgin Eby-Brown Co., 670 F. Supp. 1393 (N.D. Ill. 1987), which determined that there is no such authority:

> Nor is there any case law which indicates that an arbitrator must always consider mitigation of damages in determining back pay. Nor have we been able to locate any case holding that as a matter of law every arbitrator must take into account the grievant's duty to mitigate damages. In some areas of the law this is the case, such as in employment discrimination cases under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(g) (1982). It may even be a good idea that an arbitrator should consider an employee's duty to mitigate, but failure to do so, specifically when not requested to do so, is not grounds to vacate an arbitrator's award or to decline enforcement.

Id. at 1397. Even Elkouri & Elkouri, which Tenet claims the arbitrator mistakenly disregarded, recognizes that the rule that an arbitrator must reduce an award of back pay based upon a grievant's failure to mitigate damages has not been universally adopted: "this view has not always been accepted, as where an arbitrator stated that while it may be proper to deduct from a back pay award sums actually earned by an employee before reinstatement, or sums

received indirectly from his employer, as through unemployment compensation, no authority exists in an Arbitrator to penalize an employee financially for failing to have earnings." Elkouri & Elkouri at 594 (citation omitted).

Tenet argues that the Arbitrator was "both unaware of the doctrine of mitigation and refused to apply the doctrine. . . ." (Pl. Mem. at 7.) However, the record before the Court demonstrates that the Arbitrator was aware of the law with regard to mitigation, considered Tenet's argument that mitigation was required by law, and chose not to reduce the award of back pay because neither the CBA nor state or federal law required him to do so. (Pl. Ex. D. at 1-2.) The proposition that arbitrators must always reduce awards of back pay when the grievant fails to mitigate damages by finding new employment is not supported by "well defined, explicit, and clearly applicable" governing law. Consequently, the Arbitrator's decision not to reduce the award of back pay was not in manifest disregard of the law. Accordingly, the Court grants Local 712's Motion for Summary Judgment and denies Tenet's Motion for Summary Judgment as to Count I of the Petition.

In Count II of the Petition, Tenet requests that the Arbitrator's award be vacated because his failure to reduce the back pay award due to Fleming's failure to mitigate damages is contrary to the strong public policy of promoting production and employment. Local 712 has moved for summary judgment on this

claim, arguing that there is no strong public policy of promoting production and employment. The only support Tenet cites for this strong public policy is the Supreme Court's statement, in Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941), that, by allowing the National Labor Relations Board to consider mitigation in determining back pay awards, "we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment." Id. at 200.

The Court may vacate an arbitration award "if the arbitrator's interpretation of the collective bargaining agreement was contrary to public policy." National Assoc. of Letter Carriers, 272 F.3d at 185. However, the public policy at issue "must be explicit, well defined, and dominant. It must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Id. (citation omitted). The Court must "use common sense, keeping in mind that a formulation of public policy based only on general considerations of supposed public interests is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective bargaining agreement." United Transp. Union Local 1589 v. Suburban Tran., 51 F.3d 376, 381 (3d Cir. 1995) (citation omitted). Tenet has not met its burden of establishing, through reference to statutes or legal precedents, that the public policy of promoting production and employment is

well defined and dominant. Therefore, summary judgment is granted in favor of Local 712 and against Tenet as to Count II of the Petition.[1]

B. The Counterclaim

Local 712 filed a Counterclaim to direct Tenet to pay Fleming the back pay due to him and for attorney's fees. (Countercl. ¶¶ V (1), (2) and (3).) Both parties have moved for summary judgment on the Counterclaim to enforce the arbitration award. Tenet argues that, because the Arbitrator failed to provide a dollar amount for the back pay award, the award cannot be enforced. The arbitration award in this case is ambiguous because it does not set forth the dollar amount of back pay to be paid to Fleming. Teamsters, Local Union 330, 670 F. Supp. at 1396 (determining that an arbitrator's award, which reinstated the grievant with full back pay less earnings from other employment and the appropriate offset for unemployment compensation, was ambiguous because "it fails to specify the exact amounts to be deducted from [grievant's] back pay award."); see also Union Food & Commercial Workers, Local 7R v. Safeway Store, Inc., 889 F.2d 940, 949 (10th Cir. 1989) (reversing a district court's order entering a monetary

[1]Local 712 also seeks summary judgment denying the Petition based upon Tenet's alleged failure to file the Petition within the time period provided by 42 Penn. Cons. Stat. Ann. § 7314. As the Court has granted summary judgment in favor of Local 712 on both Counts of the Petition on other grounds, the Court need not address this argument.

judgment where the arbitration award did not state the dollar amount of the back pay award, and instructing the district court to remand the issue back to the arbitrator for a determination of the appropriate amount of back pay.). The Court cannot resolve the ambiguity from the record because neither party has provided the Court with any evidence of Fleming's salary, or the amount of his income after his termination from MCP. Teamsters, Local Union 330, 670 F. Supp. at 1396 (citations omitted). In this situation, the reviewing court should remand the matter to the arbitrator so that the amount due to the grievant may be definitely determined by arbitration. Id. Therefore, summary judgment is granted in favor of Tenet and against Local 712 on the Counterclaim to confirm and enforce the award and this matter will be remanded to the Arbitrator to determine the dollar amount of back pay due to Fleming.

Both parties have also moved for summary judgment on Local 712's Counterclaim for attorney's fees. "Attorneys' fees are recoverable in an action to enforce an arbitration award if the party challenging the award acted without justification or did not have a "reasonable chance to prevail." Catalyst Employees v. Air Products, No.Civ.A. 00-2161 (JEI), 2000 U.S. Dist. LEXIS 11126, at *14 (D.N.J. Aug. 4, 2000) (citing Chauffeurs, Teamsters & Helpers, Local Union No. 765 v. Stroehmann Bros. Co., 625 F.2d 1092, 1094 (3d Cir. 1980)). The claims made in the Petition, that the

Arbitrator acted in manifest disregard of the law, and that the arbitration award violated public policy, were not entirely unsupported by case law. Accordingly, summary judgment will be entered in favor of Tenet and against Local 712 on Local 712's request for attorney’s fees.

An appropriate Order follows.

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**O R D E R**

**AND NOW,** this day of December, 2001, in consideration of the Motion for Summary Judgment filed by Tenet Healthsystem MCP, L.L.C. ("Tenet") (Docket No. 7) and the Motion for Summary Judgment filed by Pennsylvania Nurses Ass'n Local 712 ("Local 712") (Docket No. 8), and the Memoranda of Law filed with respect thereto, **IT IS HEREBY ORDERED** as follows:

1. Local 712's Motion for Summary Judgment is **GRANTED** and Tenet's Motion for Summary Judgment is **DENIED** with respect to Count I of the Petition to Vacate and/or Modify Labor Arbitration Award and Count I is hereby **DISMISSED**;

2. Local 712's Motion for Summary Judgment is **GRANTED** with respect to Count II of the Petition to Vacate and/or Modify Labor Arbitration Award and Count II is hereby **DISMISSED**;

3. Tenet's Motion for Summary Judgment is **GRANTED** and Local 712's Motion for Summary Judgment is **DENIED** with respect to Local 712's Counterclaim to Confirm and Enforce the Arbitration Award and this matter

is **REMANDED** to the Arbitrator to determine the dollar amount of back pay awarded to Raymond Fleming;

4. Tenet’s Motion for Summary Judgment is **GRANTED** and Local 712’s Motion for Summary Judgment is **DENIED** with respect to Local 712's Counterclaim for attorney’s fees and that Counterclaim is hereby **DISMISSED.**

5. The Clerk of Courts shall **CLOSE** this case for statistical purposes.

BY THE COURT:

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John R. Padova, J.